United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

CA 75-7519

United States Court of Appeals

For the Second Circuit

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P/S

THE FIRST NATIONAL BANK OF CINCINNATI,

Plaintiff,

against

SIDNEY PEPPER,

Appellant-Cross-Appellee,

ROSALIE M. ARLINGHAUS, Individually; ROSALIE M. ARLINGHAUS, as Custodian for Frank H. Arlinghaus, Jr.; ROSALIE M. ARLINGHAUS, as Custodian for John C. Arlinghaus; ANNA MARIE SCHLERETH; HARRY W. BOGAARDS, JR.; ELSIE W. COX; RICHARD M. HOUGH; RALPH J. DEL CORO; BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS,

Appellees,

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus,

Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

THE FIRST NATIONAL BANK OF CINCINNATI, :

Plaintiff, :

-against- :

SIDNEY PEPPER, :

Appellant-Cross Appellee,

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Appellee-Cross Appellant. :

Docket Numbers:
CA 75-7519
CA 75-7545

- -X

PETITION FOR RE-HEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

SIDNEY PEPPER, the Appellant herein, petitions this Court for re-hearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and in support of his position, respectfully shows:(1.)

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1. Appellant and his counsel are mindful of the hope (and implied admonition) expressed by this Honorable Court that an end to this controversy may be accomplished "without further expenditure of judicial resources". In view thereof, Appellant does not lightly bring on this petition for re-hearing.

I.

THIS COURT ERRED EGREGIOUSLY IN HOLDING THAT WEIL WAS PEPPER'S AGENT.

This Court, having determined that Pepper could not have reasonably deemed his services to Appellant to be worth "$100,000.00 or even $75,000.00", and that his threat to retain the corporate papers and stock certificates unless such amount were paid was thus improper, nonetheless recognized that the Cross Claimants were required to show that they had "no reasonable alternative to settlement with Pepper". Crucial to such showing by Cross Claimants was proof of the uncertainty of Pepper's availability after June 7. On this point, this Court charged Pepper with responsibility for Weil's "safari" story to Unger, saying (Slip Opinion, page 13):

> "But if Pepper authorized Weil to press for the settlement on his behalf, and there is ample evidence for this, he is bound by what Weil said." (Emphasis added)

The record demonstrates beyond the slightest possibility of dispute that not only was Weil not Pepper's agent, but on the contrary that Weil was the agent and doing the bidding of Unger and the Cross Claimants.

As this Court recognized (Slip Opinion, page 7), Sonderling's offer to purchase Modern's stock or assets was withdrawn on May 14, 1968, and with such withdrawal there died any hopes which Weil had of earning, and any community of interest with Pepper in earning, any compensation out of a Sonderling-Modern transaction. Weil, a business broker and finder, sought

greener pastures in which to earn a fee. He turned to Unger in the hope that through Unger he, Weil, could salvage some compensation for his efforts. He testified:

> "After that suit down in Wilmington -- I believe Mr. Sonderling lost that suit -- I had several meetings with Unger and Lenz and Oard, and at that time, Sherman Unger told me that he is going to be buying the company himself with and for, you know, the present management, and that he knew that Sonderling didn't buy it; I wasn't going to get my commission; that he would still be willing to pay me a commission if I could help him either raise the money or -- I don't remember if Sonderling was going to appeal it.
>
> He wanted me to try to talk him into not to appeal it, and it was around that time -- just a minute, it is coming back to me.
>
> Q You tell us whether you have any present recollection as to when exactly it was that you were told, by whoever told you, that Mr. Pepper claimed a lien.
>
> A Yes. There came a time when Sherman Unger told me that in order to do this deal where he would buy the company and arrange the financing for it, somehow or other, they would have to get a release from Sidney Pepper, because he put a lien on the books and records.
>
> I don't know if it was on the stock certificates or if it was a lawyer's lien, or what it was." (Tr. p. 579, emphasis added).

It is thus clear that Weil was Unger's paid agent, but if further proof of such agency is required, it is amply fortified by the record of Weil's testimony:

"Q Your discussions about settling this matter on the documents and stock certificates was at Mr. Unger's suggestion and request that you act as a mediator between him and the selling stockholders on the one hand and Pepper on the other.

That was the function you were fulfilling in these telephone conversations with Mr. Pepper the last day or so before the closing of the Unger deal.

A Yes." (Tr., page 583)[2].

Having enlisted in the Unger-Lenz-Oard-stockholder camp, Weil proceeded to do their bidding:

"Q You have told us about the first conversation with Unger.

Now, tell us please, about the first conversation with Mr. Pepper about this. Do you have any recollection?

A I called Mr. Pepper and I said 'Look, you know, the Sonderling deal didn't do through; it fell apart. I didn't stay for the complete trial in Wilmington, but as long as Sonderling couldn't make a deal, why don't you let somebody else make the deal and let the boys buy the company.' You know, 'Why are you standing in the way of it'?

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2. And note the mysterious colloquy between Unger and Weil which appears in one of their recorded conversations (there being numerous others which were not recorded, Tr. page 552)

"Mr. Weil: Can you talk?
Mr. Unger: Sure.
Mr. Weil: You got to call me back and arrange financing.
Mr. Unger: No. I told you if we got a deal, we would listen to your financial proposal. I have the guy with me and we'll listen, and I have reviewed that with him.
Mr. Weil: All right.
Mr. Unger: He's here in town.
Mr. Weil: You know, I usually don't leave until about 1:00 o'clock on Friday. If you'd like, I'd be happy to meet you both
Mr. Unger: I intended to do that, but I wanted to do that when we find out where we are."
(Appendix 783a - 784a)

And I remember, in his first conversation, he told me it was none of my business because it was an attorney-client kind of thing, and at the point that it is settled, it will be settled, period." (Tr. pp. 552,553)

. . . .

"A Well, I went back to Unger and I told this to him and he said, 'Let's let Pepper cool down for a day or two and we will try and do some things behind the scenes ourselves. Maybe we can settle it alone.'" (Tr. pp. 553,554)

. . . .

"A I called Mr. Pepper.

Q Was this done in Mr. Unger's presence?

A Yes; to try and find out what it was that Pepper wanted in order to allow the deal with Unger and Lenz and Oard and the rest of the stockholders to go through so that they could buy the company themselves -- so they could buy Modern Talking Picture themselves * * *"
(Tr. p. 554, emphasis added)

And if, notwithstanding the foregoing record, it could be believed that Weil was Pepper's agent, he certainly was a most traitorous and faithless one. Witness Weil's testimony regarding one of his conversations on that fateful June 7:

"A They had everybody there at Modern Talking Picture, and Unger finally said okay, he says, 'Tell Pepper that we will pay him $75,000, providing that he turns over every single document, that we do get his resignations.'

He said, 'As a matter of fact, it wouldn't matter if we paid him 100; I have got to get his settlement and his release. We could even agree to settle for $100,000, because after I get all the papers, we have no intention of paying him anyway.' And I related to Mr. Pepper, I said, 'If I tell him he could have $100,000 now he is going to wonder why. Let me tell him 75.'

I related that to Mr. Pepper and he accepted the $75,000 settlement."
(Tr. p. 571, emphasis added)

And again!

> "He (i.e. Unger) said, 'We are not going to pay him the 100 today because we don't have $100,000 cash in our pockets, but we will sign an agreement to pay him the 100. Because he has been such a pig about it, now he is going to get nothing. We are not going to pay him in any event. We just want to get the release, get the papers, so we could close it.'
>
> I thought it would be foolish to offer him $100,000 because 'Why didn't you do this a week ago or two weeks ago.'
>
> I said, 'I don't think you should offer him 100. Maybe he would be willing to take 75. It would be more realistic,' and he did accept 75." (Tr. p. 582)[3].

Since Weil was never Pepper's agent, Pepper cannot be bound by Weil's safari fiction.[4]. Even if Weil were Pepper's agent - and it would, in our opinion be an incredible finding in the light of the record - he was an agent who, to the knowledge of Unger and the Cross Claimants, was conniving with them to achieve their ends in complete disregard of the duty of loyalty which he owed Pepper. Such being the case, Pepper was not bound by anything which Weil may have said with respect to Pepper's vacation propensities. Manhattan Life Ins. Co. v. Forty-Second St. & Grand St. Ferry R.R. Co., 139 N.Y. 146, 151; Wagner v. Nichols, 5 A D 2d 191, 194, 170 N.Y.S. 2d 542, 545.

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3. The Court should note that Weil's testimony reflected in the two last quoted excerpts was elicited by counsel for the Cross Claimants.

4. Again, we point out, as this Court recognized, that Pepper's physical condition precluded any safaris. The Cross Claimants knew that Pepper had had several coronaries and could hardly have believed that a departure by Pepper on safari was imminent. If this is so, is not the issue of agency irrelevant? Was it not incumbent on the Cross Claimants to prove that they believed such departure was imminent?

More significantly, is Pepper to be held chargeable because Unger, to further his own ends of acquiring Modern (perhaps to preclude renewed consideration of the superior Cahner offer) converted Weil's flight of fancy (784a) into a statement of fact and to pressure the assembled stockholders told them (without contradiction by any of the other auditors of the conversation) that "Pepper is going out of the country on Monday and if we don't resolve this, we won't be able to do it for two months" (Appendix, 813a - 814a)? And is Pepper also to be held chargeable because Lenz, who, perhaps more than anyone, stood to gain from his side arrangement with Unger, subtly suggested the possibility that Pepper might "elect to run away for two months" (Appendix, page 817a).

II.

THE COURT ERRED IN RELYING ON PEPPER'S ARIZONA TRIP IN SUPPORT OF ITS CONCLUSION.

As additional support for the proposition that Cross Claimants had no reasonable alternative to settlement with Pepper this Court said:

> "Indeed, even absence in Arizona, where Pepper did visit for more than a week beginning June 9 or 10, might have sufficed to abort the sale to Unger." (Slip Opinion, p. 14).

We have several observations regarding this Arizona trip and the Court's use of the fact.

A.

The fact that the trip was made after the settlement of June 7 proves nothing. The dispute had been resolved in Pepper's mind (the only guileless member of the whole lot) and there was no longer any reason not to go.

B.

In fact, Pepper had on June 4 put off his trip. On that date he had written his client the following letter:

> "Dear Harry:
>
> I have been caught up in two matters that arose suddenly when a sale of a business was enjoined. As soon as I find that I can take some time off I will phone you and definitely try to visit Tucson. I assume that this being an off season period I can get accomodations on a plane and at a motel without real difficulty.
>
> We really look forward to an early visit.
>
> With kindest regards to Vivienne and you,
>
> Very sincerely," (Exhibit SSS)

C.

This Court has assumed, without any basis for doing so, that Pepper would have been contemptuous or contumacious of the New York Supreme Court and would have disregarded any turn-over order which Justice Riccobono might have issued. Even if Pepper were in Arizona when the order issued (which would not have been the case, as witness Exhibit SSS above quoted), he was represented by counsel in New York who would have been served with the order and would have communicated its contents to Pepper.

Pepper was a lawyer of unblemished record, a practitioner at the New York Bar since 1925, a past Chairman of Committee on the Unlawful Practice of Law and a member of the Committee on Discipline for Attorneys of the New York County Lawyer's Association (Tr., page 18). There is no basis for the implication in this Honorable Court's opinion that steps would not have been promptly taken - even to the extent of returning from Arizona - to comply with the Court's order.

D.

There is no warrant in the record for the belief that even an absence of a week or more would have aborted the transaction. Contrary to Mr. Kelly's assertion in his trial testimony (Appendix, page 145a), the contemporaneous record of the June 7 meeting establishes that Unger was even then prepared to go the asset route if that course had to be followed.

"MR. DEL CORO: Can a stockholder take parallel actions? In other words, can we authorize the negotiation with Weil, and if that should fail, then accomplish the asset sale?

MR. KELLY: That's a strain on the lawyers.

MR. DEL CORO: Are we going to sit around here or what?

MR. UNGER: The answer is, in my judgment, that you can do both." (Appendix, page 819a)

Unger's offer (Appendix, page 655a) reserved to him the right to extend its effectiveness for 30 days beyond May 24, i.e. until June 23. Unger was hungering for the company. He had conspired with Lenz, Oard and the others to institute the Delaware Chancery proceeding to block Sonderling (Tr. page 578), he accepted Modern's payment to Casey, Lane & Mittendorf of their bill for recovery of the corporate records and even indicated acceptance of the bill for the Delaware proceeding (Appendix, page 839a), he promised Weil a fee for his assistance in putting through the settlement with Pepper, supra, and it would not have cost him a penny's difference, one way or the other, to go the asset route or the stock purchase route.

Obviously the asset route would have taken time, but Unger, as we have shown was prepared to suffer it, if need be. Is it to be doubted that he would have accepted the stock if Pepper's compliance with an order of Justice Riccobono made the stock available before the asset contract (which was then

in its earliest stage) had been agreed upon and the closing thereunder performed? Should this Court assume that he would have refused the stock? We think not.

III.

THIS COURT ERRED IN DETERMINING (IMPLIEDLY, IF NOT EXPRESSLY) THAT ANOTHER POSTPONEMENT OF THE CLOSING[5] WAS NOT AVAILABLE TO CROSS CLAIMANTS.

This Court will recall that, on oral argument, we challenged counsel to prove by any relevant statement in the entire record that the closing could not have been postponed beyond June 7. In the hope that this Court will require an answer to this petition, we renew the challenge.

We pointed out that not one word was uttered by a single witness which established a June 7 closing, and that Unger, through whose testimony the point would best have been established, was never called to testify.

We pointed out that in the supposed urgency of Cross Claimants' presentations to Justice Riccobono only a day or so before June 7, they never once mentioned June 7 but spoke only

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5. We use the word "Closing" to mean, as we think this Court meant it to mean in its prior opinion, 454 F.2d 626, the acceptance of Unger's offer by the delivery of stock certificates as required thereby. Under the terms of Unger's offer, acceptance called for delivery. This is the nub of Cross Claimant's case, for if acceptance were possible by a promise of delivery, the Cross Claimants would have had no justifiable concern over their ultimate ability to make the promised delivery for Pepper never claimed title to the stock but only a lien thereon for the value of his services and a day had to come when the stock would have been retrieved after payment of the fee fixed by the Court in the proceeding already instituted.

of an extension of Unger's offer for a "limited, indefinite time." We pointed out also that the only clear testimony in the record on the subject was that of Mr. Kelley who testified that Unger had insisted on a June 7 closing only after the decision to settle with Pepper had been reached. We quote it (Appendix, page 145a) and precede it with the only record extract to which counsel for Cross Claimants pointed.

> "We were unable to get the stock certificates from Mr. Pepper. There was then discussed somewhat more actively than had been discussed in the past the possibility of selling the assets.
>
> Q Who discussed this?
>
> A I believe Mr. Unger had generally expressed at the outset a willingness to go that route and there was a draft agreement prepared. I believe it came from Mr. Unger early in the week of which June 7 occurred, perhaps arrived at the office on June 3rd or 4th in a draft form and one of my partners worked on it as part of the deal.
>
> Q What was discussed about the feasibility or nonfeasibility of going ahead on the asset route on June 7?
>
> A I think by the time June 7 arrived it was pretty much too late to complete as against this background of Mr. Unger's offer expiring on the evening of June 7.
>
> Q What did Mr. Unger have to say about his offer?
>
> A He (Unger) made it clear that he was paying more for the financing for this particular project and had given two extensions and after the present stockholders were ready to pay, decided to pay $75,000 to Mr. Pepper, he finally took the position he wanted the deal closed as of that day and that was it.

Q Did he give any statement as to whether or not he would extend the tender offer beyond June 7?

A I don't think he put it in words he would not extend the tender offer. He made it clear that June 7 at suppertime was the end as far as he was concerned. He wasn't going to get engaged in anything, it had to be concluded by that time in any respect." (Emphasis added)

In the light of Mr. Unger's answer to Mr. Del Coro's question on June 7 (Supra, page 10) that an asset deal could still be done,[6] Mr. Kelly was obviously inaccurate in his statement that Unger's offer was to expire on June 7; and Mr. Kelly's response to the last question is perfectly compatible and consistent with his immediately preceeding response that June 7 was the end so far as Unger was concerned but only because the stockholders had already formed the decision to settle with Pepper.

In its best light (from Cross Claimants' perspective) Kelly's testimony was ambiguous - and this the only testimony which is relevant on the point out of a record of more than 1000 pages.

Did the Cross Claimants thus satisfy the burden of proving, as this Court required, that no postponement of the closing was available to them? We think not.

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6. In fact Unger said that a stock deal could still be done - which we take to mean that he would accept the stock even later than June 7 if the deal with Pepper fell through that day.

CONCLUSION

The simple facts of this case are that Pepper negotiated an advantageous contract with Sonderling and did his best to defend it for Mrs. Arlinghaus and Mr. Eberle, Modern's principal stockholders, against the management which was prepared to resort to virtually any extremes[7] to put through their own "sweetheart" arrangement with Unger.[8]

The Sonderling stock purchase offer did not "become one for the purchase of assets" (Slip Opinion, page 5). The asset contract was an alternative to the stock deal. Sonderling had required 100% of the stock and Pepper correctly anticipated that management would block it (through stockholders such as Hough) and guarded against it through the double-barrel of the asset purchase which the management could not block.

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7. To detail some of them:

1. To attempt to sell the company to Unger for $21. a share as against Sonderling's $26.45 a share.

2. To finance the Delaware litigation out of the company's coffers, using Hough as their compliant tool - Hough, a holder of 500 shares who stood to gain only a few hundred dollars at best; and note that on the record there was then no $27 offer by Unger on the horizon, at least so far as the record appears.

8. A deal whereby Lenz, not then a stockholder, would have the right to acquire stock, and designate others of the company's employees to acquire stock from Unger at his cost but on deferred payment terms. (Appendix, pages 359a - 363a; 334a).

Ultimately Pepper lost, only to be confronted with the ingratitude of Mrs. Arlinghaus whom he had sought to protect. Disappointed, even bitter, he resorted to the only remedy available to him. He asserted his attorney's lien. Did he ask for more money than he was entitled to? Perhaps so, but we cannot accept this Court's judicial notice to such effect. And even if he asserted a claim for more than he was entitled to, has it been shown that he acted in bad faith in doing so? Only a claim outlandish on its face - not one somewhat or even significantly higher than a Court might decide he was entitled to receive justifies the characterization of duress. There was no showing of bad faith such as duress requires. Oleet v. Pennsylvania Exch. Bank, 285 App. Div. 411, 414-415; Adrico Realty Corp. v. City of New York, 250 N.Y. 29, 33-34, 39-40. This Court's citation of Aronoff v. Levine (Slip Opinion, page 11) is not, we respectfully submit, apposite. There the claim was more than 2000% in excess of what was due. What of all the cases which come before this Court in which counsel in stockholder suits request allowances sometimes double or more that which is ultimately allowed. Have they too been guilty of bad faith?

We respectfully urge this Honorable Court to grant this petition for re-hearing and to reverse the decision below.

Elias Rosenzweig

BRAUNER BARON ROSENZWEIG KLIGLER & SPARBER
Attorneys for Petitioner-Appellant.

CERTIFICATE OF COUNSEL

I, ELIAS ROSENZWEIG, attorney for SIDNEY PEPPER, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

Elias Rosenzweig

Elias Rosenzweig
Attorney for Petitioner-Appellant.

Service of three ~~2~~ copies of the within
is admitted this 30 day of Nov. 1976

Casey, Lane & M. Hendorf

November 30, 1976
12:00 Noon

Daniel H. Quinton